

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, *et al.*,

Plaintiffs, and

PUYALLUP TRIBE OF INDIANS,

Plaintiff-Intervenor,

v.

ELECTRON HYDRO, LLC,

Defendant.

CASE NO. C20-1746-JCC

ORDER

This matter comes before the Court on Plaintiff United States of America's ("United States") motion for leave to file an amended complaint (Dkt. No. 51) and Defendant Electron Hydro LLC's ("Electron Hydro") motion to stay discovery. (Dkt. No. 46.) Having thoroughly considered the parties' briefing and the relevant record, the Court hereby GRANTS the United States' motion for leave to amend (Dkt. No. 51) and DENIES Electron Hydro's motion to stay (Dkt. No. 46) for the reasons explained below.

I. BACKGROUND

Electron Hydro operates a hydroelectric facility located on the Puyallup River in Pierce County, Washington. (Dkt. No. 51-2 at 1–2.) In July 2020, as alleged in the United States' proposed Amended Complaint, Electron Hydro started reconstructing the facility's diversion

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1 dam structure and spillway. (*Id.*) Under the supervision of its Chief Operating Officer, Thom A.
2 Fischer, Electron Hydro personnel created a bypass channel lined with waste field turf. (*See id.* at
3 2.)

4 On or about July 29, 2020, due to a partial breach of a plastic liner, approximately 617
5 square yards of the field turf and four to six cubic yards of crumb rubber discharged into the
6 river, portions of which continue to be found in various locations downstream. (*Id.* at 13, 14.) On
7 or about October 19, 2020, Electron Hydro then started constructing a diversion rock spillway,
8 discharging approximately 6,000 cubic yards of rock, gravel, and other fill material into the
9 Puyallup River. (*Id.* at 14.) On November 11, 2020, the United States sued under the Clean
10 Water Act to obtain injunctive relief and civil penalties against Electron Hydro for unauthorized
11 discharges into the Puyallup River. (Dkt. No. 1.) On January 10, 2022, the Washington State
12 Attorney General's Office filed criminal charges in Pierce County Superior Court against
13 Electron Hydro and Mr. Fischer for, among other things, the unlawful discharge of pollutants
14 into the Puyallup River. (Dkt. Nos. 46 at 2, 48-1, 48-2.)

15 The United States now seeks leave to amend its complaint to, among other things, add
16 Mr. Fischer as a defendant in this action. (*See* Dkt. No. 51-2 (proposed amended complaint).)
17 Electron Hydro moves to stay all discovery in this matter pending resolution of the state criminal
18 proceedings, arguing that a stay is necessary to preserve Mr. Fischer's Fifth Amendment
19 privilege against self-incrimination. (*See generally* Dkt. No. 46.)

20 **II. DISCUSSION**

21 **A. United States' Motion for Leave to File Amended Complaint**

22 The United States moves to amend its complaint to add (1) Mr. Fischer as an individual
23 defendant in this matter; (2) a claim for the unpermitted discharge of fill material under Section
24 404 of the CWA, 33 U.S.C. § 1344; and (3) additional factual allegations supporting its claims.
25 (*Id.* at 1–2.) Electron Hydro does not oppose this request. (Dkt. No. 68.) Accordingly, the Court
26 finds that justice requires granting leave to amend to the United States under Federal Rule of

1 Civil Procedure 15(a)(2).

2 **B. Electron Hydro's Motion to Stay Discovery**

3 The Constitution does not require a stay of civil proceedings pending the outcome of
4 criminal proceedings absent “substantial prejudice to the rights of the parties involved.” *Keating*
5 *v. Office of Thrift Supervision*, 45 F.3d 322, 325 (9th Cir. 1995); *see also Whitsitt v. Allen &*
6 *Assocs., LLC*, 2014 WL 11997865, slip op. at 2 (W.D. Wash. 2014) (noting that a stay of a civil
7 case pending conclusion of a related criminal case is an “extraordinary remedy”) (internal
8 quotations omitted). To determine whether a stay is appropriate, a court should consider “the
9 extent to which the defendant’s Fifth Amendment rights are implicated.” *Keating*, 45 F.3d at
10 324.

11 Electron Hydro argues that a stay is appropriate because its civil case relies on the
12 testimony of Mr. Fischer, who would undoubtedly assert his Fifth Amendment privilege against
13 self-incrimination. (Dkt. No. 46 at 5–6.) The United States argues that this fact alone is not
14 determinative, and that less drastic means would be sufficient to protect Mr. Fischer’s Fifth
15 Amendment rights. (Dkt. Nos. 54 at 6–9, 63 at 4.) The Court agrees that less drastic alternatives
16 are available, such as delaying Mr. Fischer’s deposition. Additionally, the Court notes that
17 Electron Hydro fails to demonstrate substantial prejudice in the absence of a stay.

18 Courts have repeatedly emphasized that a defendant has “no absolute right not to be
19 forced to choose between testifying in a civil matter and asserting his Fifth Amendment
20 privilege.” *Keating*, 45 F.3d at 326. And Electron Hydro itself has no Fifth Amendment rights.
21 *Curcio v. United States*, 354 U.S. 118, 122 (1957). Nor does Electron Hydro demonstrate an
22 inability to respond to discovery with information that would not incriminate Mr. Fischer. And
23 generalized Fifth Amendment concerns are insufficient to establish substantial prejudice. *See,*
24 *e.g., Federal Sav. and Ins. Corp. v. Molinaro*, 889 F.2d 899, 903 (9th Cir. 1989); *Commodity*
25 *Futures Trading Comm’n. v. Fin. Tree*, 2021 WL 2681920, slip op. at 3 (W.D. Wash. 2021)).

26 Moreover, although the extent to which Mr. Fischer’s Fifth Amendment privilege is

1 implicated is, indeed, a “significant factor” in determining whether a stay is warranted, it must be
2 weighed against:

3 (1) the interests of the plaintiffs in proceeding expeditiously with this litigation or
4 any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2)
5 the burden which any particular aspect of the proceedings may impose on
6 defendants; (3) the convenience of the court in the management of its cases, and
7 the efficient use of judicial resources; (4) the interests of persons not parties to the
8 civil litigation; and (5) the interest of the public in the pending civil and criminal
9 litigation.

10 *Keating*, 45 F.3d at 325. This Court finds that, after consideration of all the factors, the
11 extraordinary remedy of granting a stay is not appropriate.

12 1. Plaintiffs’ Interests

13 Plaintiffs’ interests in proceeding expeditiously and the potential prejudice caused by a
14 delay favors denying the motion to stay. They argue that toxins from the artificial turf remaining
15 in the river are causing ongoing environmental damage. (Dkt. Nos. 54 at 3–4, 6; 59 at 7; 63 at 3–
16 4.) Plaintiffs emphasize that the only available remedies in the state criminal case are jail time
17 and fines, which do not minimize or mitigate these ongoing harms. (*Id.*) Electron Hydro argues
18 that, even without any court orders in place, it has made an enormous effort to retrieve artificial
19 turf from the river. (Dkt. No. 66 at 1–2.) Regardless, Plaintiffs maintain that the harm caused by
20 Defendant’s conduct has not ceased and that turf, crumb rubber, and other pollutants remain in
21 the river. (Dkt. Nos. 54 at 6, 59 at 7, 63 at 3.) The evidence they provide supporting this
22 contention is compelling. (*See* Dkt. Nos. 56, 57-1–57-4, 58, 60, 60-1–60-23, 65-1.)

23 Moreover, courts generally find that a plaintiff’s interest is prejudiced when a stay would
24 cause a lengthy or indefinite delay. *See, e.g., CommScope, Inc. of North Carolina v. Electro*
25 *Products, Inc.*, 2007 WL 9775629, slip op. at 3 (W.D. Wash. 2007); *Whitsitt*, 2014 WL
26 11997865, slip op. at 3. Here, Electron Hydro requests a stay until the criminal proceedings are
resolved. (Dkt. No. 46 at 1.) But even though a preliminary trial date has been set, *see* Pierce
County Sup. Ct., Case Nos. 22-1-00044-1, 22-1-00045-9, the reality is final resolution of the

1 criminal matters could take years. (Dkt. No. 54 at 11.) And the civil proceeding has already been
2 pending for sixteen months. (*See* Dkt. No. 1.) Thus, this factor weighs strongly against a stay.

3 2. Burden on Electron Hydro and Mr. Fischer

4 In addition to concerns regarding the exercise of Mr. Fischer’s Fifth Amendment
5 privilege, Electron Hydro is concerned about potential cooperation between the United States
6 and state prosecutors. Specifically, Defendant argues that the United States is sharing documents
7 it obtained from Electron Hydro with state prosecutors, which could prejudice Electron Hydro’s
8 criminal defense. (Dkt. Nos. 46 at 6, 66 at 5–6.) More generally, Defendant is concerned that this
9 civil proceeding, if not stayed, might allow state prosecutors to take advantage of broader civil
10 discovery rules and could expose the criminal defense’s theories to prosecutors in advance of the
11 criminal trial. (*Id.*)

12 Electron Hydro’s concerns are entirely speculative. Moreover, Electron Hydro does not
13 suggest that this civil proceeding was “commenced solely to obtain evidence for a criminal
14 prosecution” or as a pretext for a criminal investigation. *See United States v. Stringer*, 535 F.3d
15 929, 938–39 (9th Cir. 2008). Nor could it, given the timing—the civil case predated the criminal
16 case by more than a year. In addition, Electron Hydro does not argue that state prosecutors are
17 interfering with the civil proceedings or have “accessed inappropriate material.” *See S.F.C. v.*
18 *Sandifur*, 2006 WL 1719920, slip op. at 2 (W.D. Wash. 2006). Instead, it merely expresses
19 concern over an e-mail distribution list’s existence, even though Electron Hydro concedes it does
20 not know what information has been shared through this medium. (Dkt. No. 66 at 6.) Thus, this
21 factor is neutral or, at most, weighs only slightly in favor of a stay.

22 3. Convenience of the Court and Efficient Use of Judicial Resources

23 Judicial economy also does not weigh heavily in favor of a stay. To determine whether
24 judicial economy favors staying a case, courts examine whether the proceedings “arise out of the
25 same event” and the “potential for complexity, overlapping issues, duplicative rulings, and
26 conflict between the rulings of this Court and the criminal court.” *See Lakey v. Washington*, 2020

1 WL 8617405, slip op. at 3 (W.D. Wash. 2020). However, courts also have an interest in clearing
2 their dockets and avoiding indefinite delays. *Molinaro*, 889 F.2d at 903.

3 Here, it is undisputed that the civil and criminal proceedings both arise out of Electron
4 Hydro's alleged unauthorized discharge of pollutants. (*See generally* Dkt. Nos. 46, 54.) Because
5 the proceedings arise out of the same alleged misconduct, there is a potential for overlap and
6 duplicative or conflicting rulings between this case and the criminal proceeding. Plaintiffs point
7 out, though, that the resolution of the state criminal case is not necessary for this civil action to
8 proceed because the two proceedings seek different relief under different laws and require
9 separate remedies. (Dkt. Nos. 54 at 11, 63 at 4.) This Court also has an interest in avoiding
10 indeterminate stays.

11 Based on this analysis, this factor, at most, weighs only slightly in favor of a stay.

12 4. Interests of Non-Parties and the Public

13 Finally, the interests of non-parties and the public weigh strongly against a stay. Non-
14 parties and the public have an interest in the speedy resolution of civil enforcement actions. *See*
15 *Sandifur*, 2006 WL 1719920, slip op. at 3. Here, the public's interest in deterring future
16 wrongdoing and in having confidence in enforcement of environmental protections is best served
17 by prompt resolution of this case.

18 Electron Hydro cites *Javier H. v. Garcia-Botello*, 218 F.R.D. 72 (W.D.N.Y. 2003), and
19 *Jones v. Conte*, 2005 WL 1287017 (N.D. Cal. 2005), to argue that the public has an interest in the
20 integrity of criminal cases, which takes precedence over civil litigants. (Dkt. No. 46 at 7.)
21 However, these two cases are not persuasive here, because this case involves not just private
22 litigants enforcing their own rights and interests, but government, tribal, and public-interest
23 organizations representing significantly larger interests than in the cases Defendant cites.
24 Moreover, for reasons discussed above, this Court is unpersuaded that the integrity of the parallel
25 criminal proceedings would be compromised. This factor therefore also weighs strongly against
26 a stay.

1 On balance, because Plaintiffs' and the public's interests in resolving this matter
2 outweigh any potential burden on Electron Hydro from its continued litigation, the Court finds
3 that a stay is not appropriate.

4 **III. CONCLUSION**

5 For the foregoing reasons, the United States' motion for leave to amend its complaint
6 (Dkt. No. 51) is GRANTED. The United States shall file its amended complaint, as proposed
7 (Dkt. No. 51-2), within seven (7) days of this Order. Electron Hydro's motion to stay discovery
8 (Dkt. No. 46) is DENIED.

9 DATED this 28th day of February 2022.

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13 John C. Coughenour
14 UNITED STATES DISTRICT JUDGE
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